

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: September 29, 2004

TO : D. Michael McConnell, Regional Director  
Region 17

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Hibbett's Sporting Goods, Inc.  
Case 17-CA-22775

506-0170

This case was submitted for advice as to whether the Employer violated the Act by terminating two employees for discovering a video surveillance camera the Employer had installed in the ceiling of their non-union workplace.

We conclude that the Employer did not violate the Act, as the employees' concerted conduct was not protected under Section 7.

### **FACTS**

Hibbett's Sporting Goods, Inc. (the Employer) operates a retail store in a mall in Topeka, Kansas. The Employer's employees are not represented by any union; nor has there been any organizing activity at the store.

Early in the morning of June 8, 2004,<sup>1</sup> the Employer's District Manager, Scott Eagle, and the Employer's Regional Loss Prevention Manager, Carmen Dubose, installed a video camera in the ceiling above the store's cash register. Eagle and Dubose left the store well before the 9:30 arrival of employees Michael May and Matthew Winkenwader, who were scheduled to open up the store that day.

When the two employees arrived to open the store, they instantly noticed that the store was in an unusual condition -- several display items were out of place, there was dust on and around the cash register that appeared to come from the ceiling, and a ladder in the back room had been moved. Shortly thereafter, a mall security guard (who was a former employee of the Employer) told them that Eagle had been in the store a few hours earlier with a woman the guard did not recognize.

May called the store's manager, Larry Farley, to report on the store's condition and to tell Farley of Eagle's visit. May asked Farley if there was anything May

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<sup>1</sup> All dates are in 2004, unless otherwise noted.

needed to know. Farley said he knew nothing about Eagle's visit,<sup>2</sup> but that he would call Eagle to find out about it. A few minutes later, Farley called back to say that Eagle had been in the store to retrieve a document he had left there on an earlier visit.

While they were preparing to open the store, the two employees heard a buzzing or hissing noise coming from the ceiling above the cash register. After about two hours, one or both of the employees decided to investigate the noise, got the ladder out of the back room, went up into the ceiling, and discovered the surveillance camera.<sup>3</sup> They did not touch the camera or interfere with its operation in any way. The two employees then discussed their assumption that the Employer must be investigating its employees working at the cash register, and May decided to ask Farley about it. There is no indication or evidence that the employees had any objections to the video camera's presence or intended to protest it in any way.

At the end of the day, May called Farley to report the daily sales totals. May again asked Farley if there was anything May needed to know. After Farley again said no, May told Farley that he and Winkenwader had found the video camera, and that installing the camera must have been the reason for Eagle's visit to the store earlier that day. May expressed no objection to the installation of the video camera, nor did he request that any action be taken about it.

Early the next morning, June 9, May and Winkenwader were told that they might be discharged for searching for, and discovering, the video camera in the ceiling. Both

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<sup>2</sup> In fact, Farley was aware of the installation of the video camera, but had been instructed not to tell employees about it.

<sup>3</sup> The two employees' statements show certain inconsistencies as to the circumstances that led them to discover the video camera. Winkenwader says that they heard a buzzing sound, that he and May did not know what the noise was, that it was he (Winkenwader) who first decided to crawl up into the ceiling and see what was up there, and that he did so because they were just curious about the noise. May claims that they heard a hissing noise, maybe gas leaking or something else leaking, and that the two employees got out the ladder together. In any case, the videotape from the camera shows that after about two hours, Winkenwader pulled out the ladder and went up into the ceiling, followed thereafter by May.

employees strongly protested that such treatment would be unfair, but did not at any time object to the Employer's installation of the video camera itself. Later that day, the two employees were terminated. The Employer has asserted that it relied upon a provision in its employee handbook that prohibited "knowingly impeding the progress of a loss prevention investigation."

On June 21, May filed the charge in the instant case, alleging that the Employer's discharge of him and Winkenwader violated Section 8(a)(1) of the Act, because they were terminated in retaliation for protected concerted activities.

### **ACTION**

We conclude that the Employer did not violate the Act, as the employees' concerted conduct was not protected under Section 7.<sup>4</sup>

Section 7 of the Act guarantees all employees, including those not represented by a union and not seeking to be represented by a union, the right to "engage in [ ] concerted activities for [ ] mutual aid or protection." Such activities are protected when they involve employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees."<sup>5</sup> Thus, the Board has approved the following articulation of the ambit of Section 7 protection:

The activity (1) must have a lawful objective, (2) must be carried out in lawful and proper means, (3) must be reasonably related to the ends sought to be achieved, (4) must be concerted, and (5) the concerted activity must satisfy the following elements: (a) there must be a work-related complaint or grievance, (b) the concerted activity must further some group interest, (c) a specific remedy or result must be sought through

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<sup>4</sup> Given our conclusion that May and Winkenwader's conduct was not protected under Section 7, we need not address whether the Employer had a legitimate business justification that would nonetheless permit it to terminate the two employees if they had been engaged in presumptively protected conduct.

<sup>5</sup> See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978).

such activity, and (d) the activity should not be unlawful or improper.<sup>6</sup>

Thus, Section 7 protects "the right of workers to act together to better their working conditions."<sup>7</sup>

The instant case presents an unusual situation where it is clear that the two employees did not intend to make any complaint, further any group interest, or seek any change in their working conditions. In this regard, the two employees did not investigate the noise in the ceiling for two hours after arriving to work, notwithstanding the noticeable disarray of the workplace. This fact, in conjunction with their inconsistent testimony regarding the reasons they looked in the ceiling, indicates that they were more motivated by curiosity than concern about an unsafe workplace or other employment condition which they may have wanted to challenge or bring to management's attention. And, in fact, there is no indication or evidence that they had any objections to the video camera's presence or were going to protest it in any way. Indeed, when May spoke to Farley about finding the video camera, he expressed no objection to the installation of the video camera, nor did he request that any action be taken about it. Even when facing discharge, the unfairness of which they each strongly protested, neither employee voiced any concern or objection about the installation of the video camera itself. Therefore, while their conduct was clearly concerted, it was not protected because they did not intend to take nor seek any action regarding their working conditions.<sup>8</sup>

This conclusion is not affected by the fact that the placement of video surveillance cameras vitally affects terms and conditions of employment and is a mandatory

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<sup>6</sup> Norton Concrete Company, 249 NLRB 1270, 1276 (1980), citing, inter alia, Shelly & Anderson Furniture Manufacturing Co. v. NLRB, 497 F.2d 1200, 1202-03 (9th Cir. 1974).

<sup>7</sup> NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962).

<sup>8</sup> While the two employees may have been treated unfairly by the Employer, we note Congress' clear admonition in the Senate Report accompanying the NLRA that the "bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair." Sen. Rep. No. 573, 74th Cong., 1st Sess. 8 (1935).

subject of bargaining in a unionized workplace.<sup>9</sup> The touchstone for Section 7 protection of concerted employee conduct is not merely that it be related to terms and conditions of employment; it must seek to do something about them. The two employees did not complain to or engage in any conversation with the Employer regarding the camera's placement, and did not intend to take any action protesting its installation. Therefore, they were not engaged in activities for mutual aid or protection within the meaning of Section 7.

Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

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<sup>9</sup> See, e.g., Colgate-Palmolive Co., 323 NLRB 515, 515-516 (1997); National Steel Corp., 335 NLRB 747, 747-748 (2001). We note that these are Section 8(a)(5) cases where the import of finding that the installation of surveillance cameras "vitally affects" employment conditions is that a 9(a) representative must have the opportunity to forestall or have input into the decision, that is, to take action by bargaining over the subject with the employer.